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IN THE

Supreme Court of the United States

October Term, 1976

In the Matter of the Application of

KENT NURSING HOME,

Petitioner,

for an Order to Quash a Subpoena issued by the Office of the Special State Prosecutor for Health and Social Services (Charles J. Hynes),

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

	PAGE
The Proceedings Below	1
Jurisdictional Statement	2
Questions Presented for Review	2
Statement of the Case	3
Point I—The petition should be denied as moot	6
Point II—The petition should be denied for want of a substantial federal question	6
Conclusion	**8**

TABLE OF AUTHORITIES

Cases:

Bellis v. United States, 417 U.S. 85 (1974)	6
DeFunis v. Odegaard, 416 U.S. 312 (1974)	6
Matter of Kent Nursing Home v. Special State Prosecutor for Health and Social Services, 38 N.Y.2d 260 (1975)	1–2, 5
Matter of Kent Nursing Home v. Special State Prosecutor for Health and Social Services, 49 A.D.2d 616 (1st Dept. 1975)	1–2, 4
Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946)	7
Shapiro v. United States, 335 U.S. 1 (1948)	7

PAGE

Statutes:

28 U.S.C. §1257(3) 2

42 U.S.C. §1396a(a) (27) 7

McKinney's Consolidated Laws of New York, Public Health Law §2308-b 6

Regulations:

10 NYCRR 730.6 7

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The Proceedings Below

In an unanimous decision, entered December 22, 1975, the New York State Court of Appeals held that a subpoena duces tecum issued to the petitioner nursing home by the Deputy Attorney General was lawful, and that the two-person partnership which owns the nursing home has no Fifth Amendment privilege with respect to its books and records. *Matter of Kent Nursing Home* v. *Special State Prosecutor for Health and Social Services,* 38 N.Y. 2d 260 (1975), *aff'g,* 49 A.D.2d 616 (1st Dept. 1975).

On January 19, 1976 the petitioner was granted a temporary stay of the subpoena by Judge COOKE of the Court of Appeals so that he could apply to a Justice of this Court for a stay pending consideration of a certiorari petition. The petitioner made such an application to Justice MARSHALL which was denied. Thereafter, the Deputy Attorney General began examining the subpoenaed books and records at the Kent Nursing Home.

Jurisdictional Statement

The petitioner seeks a writ of certiorari to review the order and decision of the Court of Appeals pursuant to 28 U.S.C. §1257(3).

Questions Presented for Review

1. Whether a two-person, family partnership which owns a nursing home receiving state and federal funds under the Medicaid Program can refuse to comply with a subpoena seeking the books and records of that home on the ground that they are within their private enclave and therefore protected by the Fifth Amendment?

2. Whether the non-judicial subpoena issued by the Deputy Attorney General for the books and records of a nursing home pursuant to his authority to investigate nursing homes violates the Fourth Amendment?

Statement of the Case

By law, the Attorney General of the State of New York and his deputies may, when requested by the Governor, inquire into matters affecting the public peace, public safety and public justice. McKinney's Consolidated Laws of New York, Executive Law, §63(8). By an executive order, the Governor requested the Attorney General to inquire into the nursing home industry in New York State. Pursuant to the authority of Section 63(8), the Deputy Attorney General issued a subpoena duces tecum to the Kent Nursing Home on April 28, 1975, directing it to produce certain books and records. Annette Severino, who owns the Kent Nursing Home in partnership with her son, moved to quash this subpoena on the grounds that Section 63(8) of the Executive Law had been improperly invoked by the Governor and that compliance with the subpoena would violate her privilege against self-incrimination. The Supreme Court of Westchester County granted her motion on the ground that Section 63(8) had been improperly invoked. The Deputy Attorney General appealed that decision to the Appellate Division, Second Department, which unanimously reversed it, holding that Section 63(8) had been properly invoked and that the owners of the nursing home have no Fifth Amendment privilege with respect to the nursing home records subpoenaed by the respondent. The opinion of that Court states in relevant part:

> The books and records described in the subpoena are required to be kept by petitioner, Kent Nursing Home, in compliance with section 2803-b of the Public Health Law and 10 NYCRR 730.6. Therefore, petitioner cannot avoid production thereof on the theory that their

> contents tend to incriminate Anna Severino and her partner in their operation of the nursing home. By virtue of the above statutory provisions and regulations, petitioner, as a licensed nursing home, must keep those books and records available for public inspection by duly authorized public officials (cf. *Shapiro* v. *United States,* 335 U.S. 1, 5; also see, *Matter of Lewis* v. *Hynes,* 82 Misc 2d 256). Moreover, Severino, as one of the partners operating petitioner, cannot avoid the production of the books and records on the theory that the production thereof would personally incriminate her, since those books and records belong to the collective entity Kent Nursing Home (cf. *Bellis* v. *United States,* 417 U.S. 85, 88; see, also, *Matter of Lewis* v. *Hynes, supra*).

Matter of Kent Nursing Home v. *Office of Special State Prosecutor for Health and Social Services,* 49 A.D.2d 616, 616-17 (1st Dept. 1975).

The petitioner appealed that order to the Court of Appeals which unanimously affirmed the decision of the Appellate Division, stating:

> The issue of the Fifth Amendment privilege against self-incrimination was raised by petitioner Kent Nursing Home and was properly disposed of by the Appellate Division. It is important to note that, while the Supreme Court in *Bellis* v. *United States* (417 U.S. 85) held that a partner in a small law firm may not invoke his personal privilege so as to justify noncompliance with a subpoena requiring production of the partnership's financial records, that court did indicate that the result might be different if a small family partnership had been involved, citing to *United States* v. *Slutsky* (352 F. Supp. 1105). In *Slutsky,* the test of *United States* v. *White* (322 U.S. 694, 701) was applied to determine whether the records

of a two-brother partnership which operated a large resort, known as the Nevele Country Club, were to receive the protection of the Fifth Amendment. Simply, the test is "whether one can fairly say under all the circumstances that a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only." Under the factual circumstances, the *Slutsky* court determined that "[i]f the Nevele were owned by a sole proprietor, there can be no question that the records would be immune from production under the Fifth Amendment. The reason for such protection does not change because there is a shared proprietorship" (p. 1107).

A nursing home is not by its nature a family business which the owners can run in any manner they choose. It falls within the definition of a "hospital" under section 2801 of the Public Health Law and, as such, is subject to extensive State regulation pursuant to article 28 of said law and title 10 of the Official Compilation of Codes, Rules and Regulations of the State of New York. Additionally, a nursing home receiving Medicaid funds must keep and make available to the appropriate State agency records regarding patient care and payments, pursuant to title 42 of the United States Code (§1396a, subd. [a] par. [27]). It is for these and similar reasons that a nursing home, albeit family-run, cannot rely on *Slutsky*.

Matter of Kent Nursing Home v. *Special State Prosecutor for Health and Social Services*, 38 N.Y.2d 260, 268 (1975).

POINT I

The petition should be denied as moot.

Following the decision of the Court of Appeals, the petitioner sought a stay from Justice MARSHALL of this Court pending determination of this petition. That application was denied and the Deputy Attorney General then examined the books and records commanded by the subpoena. Therefore, the claim made by the owners of the Kent Nursing Home regarding the Fifth Amendment are moot. *Cf. DeFunis* v. *Odegaard*, 416 U.S. 312 (1974).

POINT II

The petition should be denied for want of a substantial federal question.

The decision of the Court of Appeals was in conformity with the law of this Court as announced in *Bellis* v. *United States*, 417 U.S. 85 (1974). There was nothing personal or private about the books and records held by the partnership in this case notwithstanding the fact that the partners are mother and son. As the Court of Appeals held, these records serve as the basis for determining the Medicaid reimbursal rate for nursing homes and are required by law to be kept for examination by the Department of Health.*

* The petitioner asserts in his brief that prior to the enactment of a statute in 1974 [McKinney's Consolidated Laws of New York, Public Health Law §2308-b] there was no requirement that the records sought by the Deputy Attorney General's subpoena be kept by nursing homes. (Petitioner's Brief, at 17-18.) He argues that this statute cannot be applied to the books and records sought by the subpoena, which date from the establishment of the nursing home in 1966. This claim is specious.

(footnote continued on next page)

Cf. Shapiro v. *United States*, 335 U.S. 1, 5 (1948). Moreover, nursing homes which receive state and federal funds under the Medicaid Program to care for elderly and infirm patients are not, by their very nature, private businesses. Rather, they are public hospitals [McKinney's Consolidated Laws of New York, Public Health Law §2801] which are funded by public monies to effectuate a public policy of providing adequate health care free of cost to the elderly poor.

The petitioner's claims regarding the reasonableness of the subpoena under the Fourth Amendment are frivolous. The books and records of the Kent Nursing Home are beyond cavil relevant to the inquiry into the nursing home industry being conducted by the Deputy Attorney General. The Fourth Amendment does not require more. *See Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 210 (1946).

As the Appellate Division held, each of the records sought by the respondent was required to be kept by a regulation of the Department of Health which was first promulgated in 1966. 10 NYCRR 730.6 [formerly 752.61]; *cf.* 42 U.S.C. §1396a(a) (27). As the petitioner knows, neither the New York courts nor the respondent ever relied upon Section 2803-b of the Public Health Law to support the conclusion that these records are required records. Indeed, in his brief to the Court of Appeals, the petitioner did not dispute the applicability of 10 NYCRR 730.6 to all the books and records subpoenaed but argued that it authorized the Department of Health only to examine those records and not the Deputy Attorney General.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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